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Preparing To Win In The Pentagon's Environmental Clean-up System And Recognizing Warning Signs on the Horizon

By

Harry H. Kelso*

On Christmas Day 1998, the *New York Times*[1] featured an editorial on military cleanup overseas. The following is an excerpt:

Cleaning Up After the Pentagon

> American forces are withdrawing from military bases all over the world, but in many cases what they are leaving behind is dangerous to the local population and environment. Fuels, cleaning fluids, lubricants and other chemicals are leaching into groundwater, and unexploded shells linger on testing grounds long after American soldiers leave. . . . The risks do not stop at the border, and neither should American accountability.

The message could not have been clearer. The U.S. military establishment, particularly the Department of Defense, should be held accountable for the toxic waste and public health and safety threats it leaves.[2] The only thing the *Times* missed was that, under current policies and funding levels, the U.S. military is not really meeting its obligations at home, either.

I. Introduction

The cleanup and redevelopment of contaminated industrial properties are among the most complex, expensive, and contentious issues facing the United States today. Resolving these issues is vital because of these sites' profound impact on public health, safety, and the environment and on economic growth concerns, such as commercial and tax base expansion, and full employment. Both the Legislative Branch (the General Accounting Office (GAO), the investigating arm of Congress) and the Executive Branch (EPA) have documented this. When clean-up disputes involve sites once or now used by the U.S. Department of Defense (DOD) as military bases, the problems are even more complex.[3] The complexity results from decades of continuing hazardous activities on the part of the military; budget shortfalls for steadily increasing responsibilities; complex and overlapping military and federal bureaucracies; and DOD's institutional culture of secrecy, security, singular mission, and self-regulation.

This paper will focus on how states can defend themselves and win environmental disputes involving extraordinary clean-up expenses with DOD. Virginia's experience will provide an example of how to navigate the complex and often confusing DOD environmental clean-up system and achieve positive environmental results. A final section, "Seven Warning Signs and Significant Issues on the Horizon," features currently breaking developments that states and local governments should know in order to be prepared.

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II. Historical Perspective: Twentieth Century "Due Bills"

At the end of the twentieth century, the United States' major debt responsibilities are: (1) the national debt (trillions of dollars); (2) unfunded Social Security, pensions, and health care deficits (hundreds of billions of dollars); and (3) accrued environmental clean-up costs (hundreds of billions of dollars).[4] While these clean-up costs are for both private and public sector sites, the larger portion can be attributed to the U.S. national security establishment and its industrial infrastructure.

The United States' enormous military environmental clean-up "bill" stems primarily from contamination generated by thousands of bases, forts, yards, ports, ranges, armories, industrial infrastructure, and other facilities and properties necessary to fight four major wars, innumerable "police actions," and the forty-year Cold War. That national military effort witnessed the expenditure of some $18.6 trillion in defense spending since 1940 in order for the country to become and remain the world's dominant military power. This amount represents thirty-six percent of all federal expenditures during the period 1940–1996.[5] Unfortunately, until the late 1960s, the popular national assumption was that waste contamination was little more than a nuisance, simply a by-product of progress. It was thought that Mother Nature would, in time, heal her own wounds. By the early 1970s, however, scientific and anecdotal information had begun to demonstrate the health and environmental effects of contamination. Congress responded by establishing the U.S. Environmental Protection Agency and by passing innovative environmental legislation.

However, despite the increased emphasis on the environment, the military and nuclear weapons establishments were generally exempted from critical compliance under the veil of national security. But, once the Soviet Union collapsed, states and local entities began to press the federal government for greater compliance. This pressure increased as both the military and the Department of Energy (DOE) began to restructure their organizations by closing facilities. Finally, in 1992, Congress enacted, and President George Bush signed into law, the Federal Facilities Compliance Act which clarified and expanded the waiver of sovereign immunity for purposes of state and local enforcement under the Resource Conservation and Recovery Act.[6]

The first four rounds of Base Realignment and Closure (BRAC) cleanups, as well as the cleanup of active military facilities and Formerly Used Defense Sites (FUDS), have demonstrated that bases are, in many respects, not unlike other long-operating, polluting industrial plants. Base closings are very complex operations, requiring site characterization, cleanup or containment, and astute property disposal.

Additional closings are certain if Congress approves. Secretary of Defense William Cohen has stated that there must be additional base closures from now through 2005 for DOD to save money for the modernization of military hardware. In the Secretary's 1998 Report to Congress on past base closures,[7] as well as in an analysis of that report by the General Accounting Office,[8] it was revealed that no existing base is protected from closure. Furthermore, future base cleanups, according to these reports, will likely be even more expensive and take longer to accomplish than past cleanups of closed bases.

Politically, it is an ideal time to address the issue of funding federal facility cleanups. With Congress and the President now debating how to allocate a larger then expected budget surplus and a leaning away from tax cuts toward "saving" Social Security, why not allocate a portion of the surplus to paying off some old environmental disaster "due bills"?

III. Base Cleanup Frustrations[9]

A. Lack of Governmental Responsiveness

Responding to the "carrot and stick" approach of federal environmental legislation and pushed along by public sentiment, the private sector has generally become an involved participant in the national debate about environmental protection and public health regulation. In contrast, the public sector lags far behind, especially that part of the public sector represented by federal facilities.[10] At its own facilities, the federal government has not made a vibrant environmental and public health mission a top priority. There are three principal reasons for this failure:

1. Unlike the situation in the private sector, governmental bureaucracies and agency appropriations rarely suffer budget or personnel cuts for serious, non-combat mistakes, not even when accompanied by bad publicity or caused by poor judgment.

2. There is serious friction over power and responsibility among DOD, EPA, the Office of Management and Budget, and other agencies, fostering intra-Executive Branch turf struggles and, all too often, costly delays or inaction.

3. The congressional oversight system is simply overwhelmed and does not appreciate the comprehensiveness of the federal government's complex structural and policy dysfunctions nor does it know how to deal with them.

In addition, DOD has the following constraints: (1) The "Four S's" of secrecy,[11] security, singular mission, and self-regulation flourish in DOD's hierarchical environment. (2) The military system reassigns or rotates uniformed personnel frequently (*i.e.*, every two or three years) without regard for the continuity essential to undertake long-term efforts such as a cleanup or base closure. (3) Policies and practices are inconsistent. GAO has documented frequent differences in approaches among the Army, Navy, Marines, Air Force, and the Defense Logistics Agency. This is compounded by intense competition over allocation of the meager DOD clean-up budget pie.[12] 4) Limited clean-up budgets drive very important technical decisions leading to policy-making that emphasizes closure over cleanup.

These internal DOD problems reinforce what is already a less-than-aggressive, less-than-comprehensive clean-up effort. Cleanups are too often compromised just when DOD arrives at a point where work can actually commence. With serious risks stemming from recent DOD emphasis on early land transfers (*i.e.*, before cleanup is complete), much of the long-term burden for this massive military contamination is being shifted to the states, local governments, and communities. The huge task's dramatic costs, catastrophic environmental damages and health risks, as well as numerous safety threats, severely encumber redevelopment and economic growth.

B. Real Budgetary Constraints

Many DOD clean-up decisions are driven by a genuine budgetary gap. There are two types of military clean-up accounts annually appropriated by Congress: Environmental Restoration Accounts (ERAs) (devolved in FY 1997 from the central DOD account to the Army, Navy, and Air Force for active facilities while retaining one central DOD account for FUDS, the Defense Logistics Agency, and the Defense Nuclear Agency, as well as the Office of the Deputy Undersecretary of Defense (Environmental Security)[13]) and the Base Realignment and Closure Account (BRAC). A mere $1.7 billion has been proposed by the Administration for FY 2000 for both of these accounts. This amount reflects similar clean-up funding levels for the past few years,[14] but it is clearly insufficient considering the gravity of the contamination and clean-up challenges at thousands of active bases and closed DOD sites (BRAC and FUDS). This amount also pales in comparison to the proposed $261 billion total DOD budget for FY 2000. Exacerbating the problem is that Congress has underfunded DOD's military clean-up budget requests by $1.349 billion between FY 1992 and FY

1997.[15] As the GAO reported,[16] many cleanups have been halted in mid-stream due to budgetary problems. Experience has shown that, without requisite funding, most DOD cleanups are placed indefinitely on a "back burner."

Equally important, DOD's FY 1997–2001 Defense Planning Guidance (DPG)[17] reflects environmental restoration goals that require intense investment in the short term:

- For active facilities and FUDS: complete cleanup or remedial systems in place for all high-, medium-, and low-risk ERA sites by FY 2015; and

- For BRAC closures: (1) Clean up high-risk sites by the end of FY 2001; (2) clean up to "no further action" levels or have remedial systems in place within three years after finalization of a reuse plan or operational base closure, whichever is earlier, and (3) make property environmentally suitable for transfer under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) by the end of FY 2001.[18]

Considering the expensive, long-term clean-up obligations arising under Superfund and the Resource Conservation and Recovery Act, together with the magnitude of the contamination, this is an exceedingly ambitious schedule that contemplates rushed — and potentially abbreviated — cleanups. Thus, even when one includes the $29 million average annual DOD reimbursement to the states through the Defense-State Memoranda of Agreement program (DSMOA),[19] the $1.5 billion average annual clean-up appropriation is not a funding level that correctly anticipates the comprehensive cleanup required by federal environmental laws and regulations under this timetable. Confirmation of these serious funding problems can be found in DOD's 1995 Program Development Report: (1) Conflicts between devolvement and original congressional intentions regarding clean-up funding, since Congress created the Defense Environmental Restoration Act account (now devolved) as a central account in the Office of the Secretary of Defense (OSD).[20] Devolvement inevitably translates into less clean-up funding because of competition among environmental programs. (2) Reductions in clean-up appropriation levels, leading to DOD's relative-risk-weighing approach to cleanup. (3) The expressed intent to minimize DOD's future liability. (4) Serious inconsistencies in both policy and implementation, making stable levels of clean-up funding over time impossible.

Pentagon defenders counter that federal facility clean-up funding is huge — $17 billion since 1984 — in comparison to that at private sector Superfund sites. However, such comments ignore the scope of the problem involving twenty-five million acres — an area roughly the size of the State of Tennessee.[21]

C. The "Unitary Executive" Theory

The problem, however, does not lie altogether with the Defense Department. EPA is crippled when attempting to enforce against other federal departments and agencies. The reason for this is the unitary executive theory,[22] a legal concept amplified in 1987 congressional testimony by the Assistant U.S. Attorney General for the Justice Department's Land and Natural Resources Division.[23] Simply put, the theory is that all Executive Branch departments and agencies are ultimately accountable to the President as the "Unitary Executive." Legally speaking, there is no "case or controversy" — the threshold for bringing a lawsuit under Article III of the Constitution — if the President, acting on behalf of EPA, sues the President, acting on behalf of DOD.

The federal government often counters the criticism of the unitary executive theory by pointing to EPA's imposition of civil penalties administratively in a few notable cases. However, EPA's record against federal facilities shows that, compared to its aggressive private sector record, enforcement with coercive civil penalties is relatively rare and the resulting penalties are comparatively meager.[24] Moreover, in those few cases where EPA did successfully impose civil penalties, senior EPA and DOD officials report that it typically took years before

Congress appropriated funds for the offending agency to actually pay the civil penalty.[25] Enforcement statistics show that EPA is virtually ignored by the Pentagon.

Since EPA has no "big stick" to hold DOD accountable, much of DOD's clean-up program goes unmonitored. Accordingly, DOD typically performs its environmental responsibilities as it sees fit, esentially as a hazardous waste owner, operator, generator, and transporter "enforcing" against itself. This vacuum of supervising authority pleads for an enforcement entity that is independent of these constraints and has the political, legal, and financial strength to require environmental compliance and cleanup.

D. Congressional Impotency

In our democratic government of checks and balances, the Legislative Branch normally "oversees" Executive Branch departments and agencies. With respect to military cleanup, if practice always followed theory, congressional committees would filter through the functional confusion and overlap that exist in more than a dozen federal bureaucracies and press the President for *one* environmental clean-up authority. This effective environmental clean-up authority, unbeholden to any other federal agency, would render moot the unitary executive theory and instill order and discipline in DOD cleanups (and in cleanups by that other federal agency with gargantuan clean-up problems, the Department of Energy).[26]

However, considering Congress' lack of commitment to comprehensive DOD cleanup, no one on the Washington, D.C., political scene really expects to have one new, independent, efficient, empowered environmental clean-up authority.[27] Unfortunately, congressional appreciation of the gravity of the military clean-up problem and adequate support for EPA's enforcement efforts or comprehensive cleanup are nearly non-existent. Congressional attitudes regarding EPA enforcement attempts at DOD sites vary widely, from hostility to lukewarm support. Furthermore, few congressional oversight hearings on federal facilities have been conducted, even in recent years when base closures have become prominent. Instead, Congress has relegated DOD facility cleanup to its present orphan status while giving most of its serious political interest to military readiness and its job-generating contracts. This view is bolstered by congressional inaction in the face of DOD's failure to meet the goals it pledged in its DERA Devolvement Report[28] (1) program, policy, and execution consistency between DOD components; (2) adequate clean-up funding; and (3) effective enforcement mechanisms.

On top of all of this, Congress is seemingly overwhelmed by the confusion of the federal environmental protection "jungle." One need only read correspondence between congressional committee chairs and GAO and Executive Branch officers asking for overall reviews and perspectives to appreciate the problem. The "answers" received often contain only more obfuscation along with another avalanche of difficult-to-read documents. The GAO's 1998 review[29] of the Defense Secretary's Report on Base Closures[30] is a good example. "Comprehension fatigue" finally sets in and carries the day, neutralizing the system of congressional checks and balances on this part of the Executive Branch.[31]

IV. A Second Editorial

It is unrealistic to believe that the United States can seriously affect its nearly sixty-year military contamination problem with a few years of paltry clean-up spending. One need only compare the $18.6 trillion invested in defense spending since 1940 with an average of about $1 billion per year in the sixteen years since 1984 (including $1.5 billion a year from FY 92 through FY 97)[32] for cleanup of thousands of active facilities, FUDS, and a handful of closed bases. Many of these facilities date to the pre-World War II era. Even reviewing this challenge through the lens of DOD's own internal plans, goals, and funding choices — The Defense Planning Guidance — the inescapable conclusion is that this system, with its institutional and funding barriers, is set up to fail.

The *New York Times* editorial of last Christmas, partially quoted at the outset of this paper, is not adequately proscriptive. Military clean-up efforts have been disgraceful. There have been no practical offsets to organizational confusion, bureaucratic blindness, and widespread obfuscation by the Executive Branch and no comprehensive understanding of the problems or willingness to resolve them by Congress. This system is fatally broken. It is a case of everybody's business being nobody's business.

In our nation's history, where neither the Executive Branch nor the Legislative Branch has demonstrated the political will to remedy an acknowledged injustice or problem, the Judicial Branch has had to step into the breach. In 1954, the U.S. Supreme Court issued *Brown v. Board of Education*,[33] ending a ninety-year stalemate over racial equality under the law. Similarly, on this highly specialized, momentous, national issue of the cleanup of federal (especially DOD) facilities, proper remedies must now come from the federal courts. In addition, the principal complainants must be sovereign, outside the federal government. Only the states have the power to break this impasse. EPA policy[34] agrees with this, recognizing the agency's own limitations and advocating that states utilize their broader enforcement authority to address federal facility violations. Certainly, such use must include litigation.

Something else is also true. Filing a federal lawsuit can be an effective end in itself. It forces the complainant to do its homework, including discovery, discovery, and more discovery. And it does get a federal agency's attention at the right level. Then matters can fall into place and settlements with firm environmental, public health, and safety goals, schedules, and milestones can be reached. In Virginia, for example, this procedure was far easier than never-ending wrangling, and it was far less expensive and rancorous.

V. The Role of the States — National Leadership[35]

With the federal government's performance record demonstrating that it is unable to tackle this problem with its due gravity and scope, the only entities that can lead this effort are the states with their sovereign powers and ability to focus high level attention. In fact, the states are just the right leaders in this rare period of power devolution from the federal to state governments. Clearly, local governments, citizen groups, local reuse authorities, and restoration advisory boards do not carry the requisite weight or possess the expertise. It is essential that states develop mechanisms to protect their own interests.

Still, the states will have to "gear up" for this effort, because DOD and the federal government are strong opponents and, with few exceptions, state and local governments have insufficient experience and expertise in DOD matters. It is difficult enough for states to grasp the basics of EPA's structure and the names of key decisionmakers; few states have even that rudimentary understanding of DOD's internal structure. States are, understandably, consumed by the problems of their own agencies and issues: education, transportation, law enforcement, and social service benefits and, to a lesser extent, state environmental laws and authorized EPA programs. They tend to defer environmental and public health matters on military bases to federal government officials, hoping for resolutions someday. As a consequence, the states, along with county and local governments, are far too often trapped among barriers erected by contentious differences between federal agencies, such as EPA, DOD, and OMB.

Why haven't the states as a whole been more aggressive in protecting themselves?[36] There are two principal factors: (1) The political power dynamics in the federal-state relationship; and (2) the relative dearth of jurisprudence involving litigation by states against the U.S. government in regard to environmental and public health matters at military facilities. Legally and politically, these two factors have often been considered too much of an obstacle to

conquer. Moreover, with only a few exceptions, states have not taken the initiative to equip themselves with strong enforcement mechanisms to protect their environment. In fact, it has only been in recent years that states have seriously begun to address environmental problems regarding their own *state-owned* properties. Thus, when delays, work stoppages, and shortcuts in base cleanups occur for any reason,[37] it frequently comes as a shock to state and local officials. As a result, states (and local governments) feel powerless, and are often "left holding the bag." Litigation is, however, the most effective strategy states have to protect themselves.[38] It has four strengths:

1. It is effective: the states are not beholden to the federal unitary executive theory barrier where sovereign immunity has been waived. Furthermore, neither the military nor the federal bureaucracy can then control the enforcement agenda and continue to frustrate prompt resolutions.

2. It is often the least expensive way to proceed and prevail. So much money is wasted, at both federal and state levels, in years of endless discussions, correspondence, and meetings about when and how cleanups should be done, resulting in the legal equivalent of "Who's on First, What's at Second, and I Don't Know's at Third." This circular madness is at the root of mind-boggling, non-productive costs. In the private sector, filing a lawsuit is often the last thing one wants to do. To get swifter action from the Pentagon, it is probably one of the first things a state should consider doing.

3. It is a superb balance-of-powers strategy. When the Legislative and Executive Branches do not act, the judiciary can break the impasse. Department leaders have to submit themselves to the judicial process. For instance, the U.S. District Court in Washington, D.C., in February 1999 held the Secretaries of the Treasury and Interior in contempt of court for departmental failures to produce documents requested in litigation.[39]

4. It forces agencies to face funding issues. Executive Order 12088 requires federal agency heads to budget for enforceable obligations. The Order, issued in 1978 by President Carter, states that agency heads are responsible for compliance with applicable pollution control standards and must ensure[40] that sufficient funds for such compliance are requested in the agency's budget. Agencies have interpreted this to mean that they must request sufficient funds to meet enforceable standards: judicial consent decrees, administrative orders, and the like. As the result, judicial orders can become the vehicle of choice to enforce cleanups, requiring agencies such as DOD to ensure that all clean-up measures and milestones are the subject of authorization and appropriation.

One tactic for states to use is to take advantage of the expertise of EPA and other federal standard-setting agencies. A marriage between a state, as litigant-enforcer, and EPA, with its valuable expertise, can be extremely effective in ensuring that DOD devotes the necessary dollars and complies with appropriate clean-up standards.

Overall, the military clean-up picture is still bleak: no aggressive DOD environmental clean-up priority or action; many DOD budget and bureaucracy problems; EPA enforcement weaknesses; congressional futility and despair; disorganized states, local governments, citizens, and local base closure groups. The result is that states become responsible for federal irresponsibility. However, it does not have to be this way. Virginia was faced with these types of problems but, through litigation and proactive negotiation, was able to hold DOD accountable.

VI. Virginia's Successes in Environmental Litigation and Base Closure Negotiations

In two recent agreements, one involving a base closure and one involving a large Superfund site, the Commonwealth of Virginia and its municipalities avoided committing hundreds of millions of dollars to future environmental cleanup. By suing and negotiating from a position of strength, Virginia was able to hold DOD and its Armed Services accountable for the cleanups.

A. Avtex Fibers Superfund Litigation Settlement[41]

In February 1997, the Commonwealth of Virginia brought a Superfund enforcement and cost recovery lawsuit against the United States (DOD, the Air Force, Department of Commerce, and NASA) and the FMC Corporation — all Superfund Responsible Parties — at the Avtex Fibers Superfund (NPL) Site in Front Royal, Virginia. Though not named as a defendant, the National Security Council was also involved through its 1988 decision to fund $44 million to bail out and restart a closed, sole-source supplier of carbonized rayon needed by the Air Force for missiles and by NASA for the space shuttle. Eight months after filing suit, in October 1997, Virginia obtained a settlement that required the United States and FMC to reimburse the Commonwealth for all of its previously paid Superfund clean-up costs, expended between 1989 and 1997 — some $1.3 million. In addition, EPA, which had not enforced against any of its sister federal agencies, agreed to provide the Commonwealth approximately $175,000 in Superfund cost credits to be used at any Superfund site of the state's choice as a dollar for dollar match in lieu of reimbursing the legal fees of Virginia's outside legal counsel. This settlement virtually assured the Commonwealth it would be able to avoid spending any of its own funds on future clean-up costs at this four hundred forty-acre site. Such potential future exposure had been estimated at $100 million.

This victory arose out of a determined investigation conducted by the Office of Enforcement at the Virginia Department of Environmental Quality (DEQ). Logic dictated that this once-beautiful farmland could only have been desecrated with *official* permission: it went on too long and continued even after the plant was shut down once and then restarted, refinanced by the military. Virginia's task was to find out who authorized whom to "continue operations" despite the on-going contamination, when, and why. The investigation required Virginia DEQ to study the history of this project, eventually leading it, through multiple federal agencies, to National Security Council and Air Force documents that revealed "smoking guns." Having gained comprehensive knowledge of the federal government's past decisions, Virginia DEQ recognized that the actions were taken in the interest of national security during Cold War competition. The dispute was not with the high-level, national security decision which resulted in continued pollution at that very critical moment, only with the contention of the federal government and FMC that Virginia should pay for part of the ongoing cleanup.

Immediately after filing suit, the defendants sought to negotiate a settlement in light of DEQ's comprehensive evidence demonstrating Superfund liability by both the federal government and FMC Corporation. Without any litigation discovery, the parties reached the settlement.

B. Fort Pickett, Virginia, Base Closure[42]

In late 1997, the U.S. Army and the Commonwealth of Virginia (through its National Guard) entered into a Facility Use Agreement (FUA) regarding Fort Pickett, a 42,500 acre Army post owned and operated by the Army since its creation in the early 1940s. This FUA provides the Commonwealth with unprecedented environmental and tort legal protection[43] while allowing the Virginia National Guard to use and occupy (*i.e.*, manage) the post, still owned by the Army. This protection insulated the Commonwealth from a potential $500 million clean-up liability. As in the case of *Avtex Fibers,* thorough preparation and a certain adamancy were the keys to successful negotiations. Virginia repetitively argued that what it wanted was only what EPA consistently demands of others.

The agreement, reached after nine months of negotiations with the Departments of Defense and Army, governs the Commonwealth's use and occupancy (day-to-day management) of Ft. Pickett, an Army facility "closing" pursuant to the 1995 round of base closures. The FUA contemplates — as articulated by the Army in the BRAC Commission hearings —that DOD and its military services, and the National Guards of other states, will continue their federal military training on the fifty-five-year old post.

This agreement achieved all of the goals that then-Virginia Governor George Allen set forth in a January 1997 letter to Secretary of Defense William Cohen sent at the commencement of negotiations.

The major environmental provisions of the FUA are:

1. The United States will pay all environmental costs arising out of past (Pre-Virginia National Guard management) DOD Activities, including an express agreement that Virginia has no duty to defend the United States for past DOD activities;

2. The United States will pay all future environmental costs arising out of the Virginia National Guard's management of the post. The military base remains titled in the United States. All such costs will be borne by the federal government unless the Virginia National Guard's management amounts to willful misconduct or gross negligence;

3. A presumption during the first five years of the Virginia National Guard's management that any newly discovered contamination actually existed prior to the Virginia National Guard's assumption of management *(i.e.,* keeping DOD responsible) and that this five-year presumption shall automatically be extended for an additional five years if all BRAC environmental studies (required by law) have not been completed within four years, six months after Virginia assumes management of the post; and

4. Exclusion from the agreement of known contaminated areas with the Virginia National Guard retaining the right to use such areas without incurring environmental liability. This exclusion includes the critically important explosive firing ranges still containing toxic, unexploded ordnance (UXO).[44]

C. Virginia's Tools For Winning — Background Assumptions for Preparation

1. A state must recognize that the basic priorities of DOD are categorically in conflict with its own. DOD's agenda is short-term, saving money through quick disposal or transfer of closed DOD facilities at minimal cost and minimal effort — for itself. This too often means imposing "institutional controls" that severely limit land uses. In fact, such land may not be useable *at all,* as in the case of remaining unexploded ordnance (UXO). Conversely, the states' agenda is long-term — complete cleanup by DOD over an agreed-upon timetable, finally returning the property to unrestricted private usage.

Essentially, the states need to hold DOD accountable for decades of contamination and cleanup, in order to place themselves and their communities in the position of having a realistic chance of reusing and redeveloping former bases. States, local governments, developers, and other parts of the private sector normally recognize the risks for redeveloping contaminated property, but the military's ultrahazardous activity and contamination (not to mention the lethal threat of its unexploded ordnance) make any prospect of reasonable risk for redevelopment exponentially higher. Too often, still-contaminated military properties are sold to often uninformed or unwitting private or non-federal government purchasers who do not recognize the gravity of the cleanup to be performed in order to redevelop the parcel. And, like any other entity seeking to avoid costs, the federal government regularly asserts every defense and avoidance tactic:[45] statutory, policy, agency structure, budgetary, and the like, to shift those burdens to some other entity — in this case, the states. These tactics include asserting sovereign immunity to avoid state laws and budgetary and funding concerns, regardless of the consequences.

2. In order to negotiate or litigate from a position of strength, it is important that the state know DOD's case better than DOD knows it itself. States must also understand and "speak" DOD and federal environmental "foreign languages" and know the key players. DOD is a large landowner with expertise in every aspect of property disposal; thus it is critical for states to be able to match that advantage. It must be recognized, however, that DOD and service negotiators are not always completely informed on every issue and, thus, intra-DOD and intra-service conflicts on major substantive issues frequently exist, including serious differences among experts on technical issues that may be the most expensive aspect of cleanup. Candidly, because of the overwhelming breadth of issues to be dealt with, it is practically impossible for any specific DOD negotiating team to be expert and completely informed about every law, policy, regulation, or technical issue. Notwithstanding this, states must arm themselves well for these confrontations, and thus negotiate or litigate from a position of strength. Without such expertise and in particular, with no knowledge of the internal DOD and federal environmental "foreign languages" — the states are at a fatal disadvantage. Any future redevelopment — even with expected risks — is compromised. There is no substitute for thorough preparation, especially on the following substantive matters:

- Policies and organization of both state and federal environmental agencies
- Public Health matters, including those under the aegis of the Agency for Toxic Substances and Disease Registry
- Military infrastructure, both civilian and uniformed
- Multi-year development process of the defense budgets
- Federal Tort Claims Act
- Property and redevelopment issues
- Public utility law
- Local government ordinances, especially those involving land use
- Labor and employment considerations
- Economic growth plans

3. Winning against DOD requires a strong commitment from top state officers. Commitment from the governor, the attorney general, and other top state officials is essential to be successful. Top officials must have the political will to "stay the course." As an example, top Canadian officials displayed the success of this type of commitment when they recently achieved an agreement with the United States under which Canada will be reimbursed a total of $100 million over the next ten years for environmental cleanup at Canadian sites formerly used by DOD.[46] The agreement was the result of determined effort over several years, taken originally at the highest levels of the two national governments.

4. There are severe consequences if states do not act forcefully. To appreciate the threat to states, one need only examine the incredible damages remaining at such places as the Massachusetts Military Reservation on Cape Cod, Massachusetts; Avtex Fibers on the Shenandoah River in Virginia; the Rocky Mountain Arsenal in Denver; and Fort Ord, on the Pacific Ocean just north of Monterey, California.

VII. Seven Warning Signs and Significant Issues[47] on the Horizon

1. The Secretary of Defense has told Congress that more base closures are coming. The April 1998 Report of the Secretary of Defense contains statements of DOD intentions that are sure warnings to states and local governments with military facilities.[48] When the Secretary told Congress in 1997 that he needed more base closures, Congress responded by enacting Section 2824 of the National Defense Authorization Act of 1998, requiring him to provide Congress with a comprehensive report on a range of BRAC issues and prohibiting DOD from spending funds to plan for future BRAC actions until the report was delivered to Congress. In April 1998, DOD submitted the report, which was reviewed by GAO. These two documents revealed the following:

- Two rounds of base closures are proposed for 2001 and 2005.

- All existing bases will be considered for closure.

- The next rounds will be conducted similar to previous ones of the late 1980s and 1990s.

- These next rounds may very well be more expensive than earlier ones because, in previous rounds, the military services often selected bases that were less expensive to close.

- If Congress does not approve legislation providing authority for additional base closures, the Secretary has stated that he will consider deferring maintenance and upkeep of existing facilities as a way to minimize infrastructure costs.[49] In fact, DOD has been doing exactly this for several years in making tradeoffs in funding priorities, according to GAO. For ten years, from FY 1987 to FY 1996, DOD's total "Operation and Maintenance" funding for facilities maintenance and repair declined by thirty-eight percent on average in real terms.

2. DOD has proposed to spend less money on cleaning up BRAC bases in Fiscal Year 2000 than in FY 1999.[50] According to a DOD budget official, this decrease in the BRAC clean-up budget request is "a signal that the military is nearing the end of its remediation [clean-up] responsibilities at BRAC sites."[51]

3. DOD has proposed to defer sixty percent of its BRAC Cleanup Appropriation for FY 2000 to FY 2001.[52] Military sources stated that this proposal, which requires the approval of Congress, is not a "cut" in the clean-up budget but is instead a means to improve money management and pay bills as they come due. One official is quoted as saying that "the deferral is part of a 'big picture' balancing act that could help provide short-term funding for military readiness concerns."[53] So far, the BRAC clean-up account is the only environmental account expected to be affected.

4. States are encountering serious opposition from DOD regarding clean-up standards and environmental oversight costs.[54] At the February 1999 Meeting of the Defense Environmental Response Task Force, testimony from state officials reflected a growing concern over DOD's continuing unwillingness to accommodate states' demands regarding clean-up standards and the funding of oversight costs at closing bases. One need only review Colorado's tortured litigation regarding the Rocky Mountain Arsenal to appreciate state prerogatives over cleanup.[55]

5. EPA is expressing frustration with the U.S. Army Corps of Engineers (the military agency in charge of cleanup at FUDS), due to lack of action plans for cleanups of nearly 10,000 FUD sites.[56] Unlike the well-publicized BRAC closures, FUDS — properties that DOD or the services formerly owned or used — have not received the same priority or as much publicity. Buried munitions and unexploded ordnance dating to World War II have been discovered at many such FUDS.[57] In addition, some states express concerns about "self-regulation" by the Corps in regard to the extraordinary number of "no further cleanup" ("No Further Action") decisions made by the Corps at many FUDS. These decisions can lead to a

false sense of security by property transferees in respect to the environmental conditions at such former DOD sites.

6. DOD's policy for future, additional cleanup is inflexible. Once DOD has completed cleanup under a future land use and clean-up plan, DOD will not return to do additional clean-up work. In its policy on additional cleanup,[58] DOD seeks "to notify the community of the finality of the clean-up decisions and limited circumstances under which DOD would be responsible for additional cleanup after transfer." Essentially, DOD's policy states that once a future use plan has been agreed to by DOD and local entities, DOD will not return to conduct any additional cleanup that is over and above that called for in the agreed-to future use plan. Therefore, if a transferee of property ever seeks to remove any deed restrictions to facilitate a broader range of uses, liability for the payment for all required cleanup (including studies and financial surety) is the transferee's, including all clean-up studies and clean-up costs.

7. Sovereign immunity and the authority of states to enforce their own environmental laws remain contentious legislative issues. This includes enforcement against the United States on transferred DOD properties either before or subject to the "Early Transfer Authority" of the 1997 Defense Authorization Act.[59] The defense of sovereign immunity was clarified and expanded for hazardous wastes by the 1992 Federal Facilities Compliance Act.[60] However, enforcement of state laws remains encumbered because the waiver is limited to solid and hazardous waste under RCRA and, thus, does not cover hazardous substances under state law. Since many states now have standards more stringent than federal requirements, this inability of a state to enforce its own law has become a point causing considerable irritation in the states when dealing with the federal government, particularly DOD. It is an especially serious concern regarding DOD properties transferred before 1997 or subject to the "early transfer" provision of the 1997 Defense Authorization Act. (Section 334 allows the federal government to transfer property before cleanup is certified as complete by EPA.) As a result, legislation has been introduced in Congress by Reps. Diana DeGette (D–Colorado) and Charles Norwood (R–Georgia) which would, if enacted, include state laws under the sovereign immunity waiver. The legislation, H.R. 617, is modeled after the Federal Facilities Compliance Act to strengthen state enforcement of hazardous substances. Specifically, the legislation would:

- Subject the federal government to civil penalties under state law or CERCLA;

- Subject the federal government to liability for formerly owned and operated facilities under state law;

- Subject the federal government to procedural and substantive provisions of state hazardous substance laws; and

- Amend the administrative authority of EPA.

To no one's surprise, DOD and DOE have announced their opposition to this waiver legislation.[61] Surprisingly, EPA also opposes the legislation,[62] in spite of its fundamental environmental mission and its policy of encouraging both state enforcement against federal facilities and broad stakeholder leadership and public participation.

VIII. Conclusion

At a time when the concept of federalism is being more closely reexamined than any point since the New Deal, states have an ideal opportunity to reevaluate their roles in the complex area of military environmental remediation. States should seize the moment and force the federal government to face up to its terrible environmental legacy. Only with such action will DOD and other federal agencies be held accountable. Litigation should therefore not be viewed as the last strategy to use when all else fails but as a first and primary tool to force compliance on the part of the federal government. Armed with the necessary knowledge, states can then be successful not only in litigating about federal facilities but also in negotiating from strength.

ENDNOTES

1. *Cleaning Up After the Pentagon*, N.Y TIMES, Dec, 25, 1998, at 32.

2. SETH SHULMAN, THE THREAT AT HOME: CONFRONTING THE TOXIC LEGACY OF THE U.S. MILITARY (1992).

3. In its periodic "High Risk" Report series, the General Accounting Office (GAO) has identified DOD's infrastructure reductions as presenting one of the most serious management and program risks in the federal government:

> DOD has found that infrastructure reductions are difficult and painful because achieving significant cost savings requires up-front investments, the closure of installations, and the elimination of military and civilian jobs. DOD's ability to reduce infrastructure has been affected by service parochialism, a cultural resistance to change, and congressional and public concerns about the effects and impartiality of decisions.

GEN. ACCOUNTING OFFICE, HIGH RISK SERIES — AN UPDATE (Rep. No. HR-99-1) (Jan.1999).

Even more specifically, GAO reported:

> DOD has not estimated and reported on material environmental and disposal liabilities. While DOD reported nearly $40 billion in estimated environmental cleanup and disposal liabilities for fiscal year 1997, its reports excluded costs associated with military weapon systems or training ranges — these undisclosed liabilities are likely to be an additional tens of billions of dollars.

GEN. ACCOUNTING OFFICE, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS — DEPARTMENT OF DEFENSE (Rep. No. OCG-99-4) (Jan. 1999).

EPA policy documents this special difficulty, including the threat of incurring Superfund liability, that typically retards reinvestment and redevelopment. *See* OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE & OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. EPA, POLICY TOWARDS LANDOWNERS AND TRANSFEREES OF FEDERAL FACILITIES (June 13, 1997). Note that, notwithstanding its stated effort to allay concerns regarding enforcement against transferees of contaminated federal properties, the policy explicitly states that it does not bind EPA from taking any action counter to this policy.

4. *See* Adam Babich, *Circumventing Environmental Laws: Does the Sovereign Have a License to Pollute?* 2 NAT. RESOURCES & ENV'T 28 (1991).

5. ATOMIC AUDIT: THE COSTS AND CONSEQUENCES OF U.S. NUCLEAR WEAPONS SINCE 1940 (Stephen I. Schwartz ed., Brookings Institution) (1998); *see also* Walter Pincus, *U.S. Has Spent $5.8 Trillion on Nuclear Arms Since 1940, Study Says*, WASH. POST, July 21, 1998, at A2. The largest three categories of the aggregate $51.558 trillion in federal expenditures made from 1940 through 1996 are (1) Non-nuclear defense: $13.216 trillion; (2) Social Security: $7.856 trillion; and (3) nuclear weapons and infrastructure: $5.481 trillion. Arithmetically, national defense amounted to 36.26 percent of the total expenditures.

6. *See* 42 U.S.C. § 6961. A waiver already existed for injunctive relief, but federal courts had held that it did not clearly waive immunity for civil and criminal penalties. *See* U.S. Department of Energy v. Ohio, 112 S.Ct. 1627 (1992).

7. DEP'T OF DEFENSE, BASE REALIGNMENT AND CLOSURE (Apr. 1998).

8. GEN. ACCOUNTING OFFICE, MILITARY BASES: REVIEW OF DOD'S 1998 REPORT ON BASE REALIGNMENT AND CLOSURE (hereinafter MILITARY BASES) (Rep. No. NSIAD 99-17) (Nov. 1998).

9. The "frustrations" outlined in the text mirror those contained in a joint report issued by the National Governors Association and the National Association of Attorneys General Task Force on Federal Facilities, FROM CRISIS TO COMMITMENT: ENVIRONMENTAL CLEANUP AND COMPLIANCE AT FEDERAL FACILITIES (hereinafter FROM CRISIS TO COMMITMENT), issued July 14, 1997. These include federal facility compliance issues, including program and policy inconsistency arising out of inadequate federal oversight, the federal unitary executive theory, and inadequate clean-up funding.

Ironically, DOD reported to Congress on these same issues one year before as justification to devolve the centralized Defense Environmental Restoration Account to the component services. These are: (1) Oversight: Give the Office of Secretary of Defense (OSD) the authority to strictly oversee the clean-up program to ensure program, policy, and component consistency and standardization; (2) Adequate funding: Grant the services the authority to manage their own clean-up funds (thus confronting fiscal reality as well as being held accountable for such management), with the result of placing clean-up funding in competition with other service environmental responsibilities (such as current compliance demands); and (3) Enforcement: Grant OSD "institutional enforcement mechanisms" to ensure that DOD components meet established OSD goals. *See* DEP'T OF DEFENSE, REPORT TO CONGRESS ON THE DEVOLVEMENT OF THE DEFENSE ENVIRONMENTAL RESTORATION ACCOUNT (hereinafter DEVOLVEMENT REPORT) (Mar. 31, 1996). Moreover, one year earlier, when analyzing the potential devolvement issue, DOD acknowledged that, despite persuasive arguments for devolvement, these serious inadequacies in oversight, funding, and enforcement could compromise the program and should be anticipated. *See* DEP'T OF DEFENSE, PDM #1 PROGRAM DEVELOPMENT REPORT (hereinafter PDM #1 REPORT) (July 21, 1995).

10. Governments at all three levels — federal, state, and local — operate polluting facilities, but the most serious environmental problems are located at federal facilities, especially at those operated by the Departments of Defense and Energy. *See* Babich, *supra* note 4.

11. *See* Laurent R. Hourcle, *Military Secrecy and Environmental Compliance*, 2 N.Y.U. ENV'L L.J. 316-46 (1993).

12. As an example, *see* GEN. ACCOUNTING OFFICE, BETTER COST-SHARING GUIDANCE NEEDED AT GOVERNMENT-OWNED CONTRACTOR-OPERATED SITES (Rep. No. NSIAD-97-32) (Mar. 1997). This report documents the divergent practices among the Army, Navy, and Air Force regarding indemnification of private contractors at so-called GOCO facilities.

13. *See* CONG. RES. SERVICE, ENVIRONMENTAL PROTECTION: DEFENSE-RELATED PROGRAMS (Rep. No. 97-790 ENR) (July 28, 1998) (hereinafter ENVT'L PROTECTION); and DEPARTMENT OF DEFENSE ENVIRONMENTAL PROGRAMS: BACKGROUND AND ISSUES FOR CONGRESS (hereinafter DOD ENVT'L PROGRAMS) (Rep. No. 96-218F) (Mar. 6, 1996); DEVOLVEMENT REPORT, *supra* note 9; PDM #1 REPORT, *supra* note 9. According to some state officials, the devolution of the DOD clean-up program, recommended by DOD, has made cleanups more difficult because of policy and practice inconsistencies among the armed services, intra-DOD budget competition, and DOD's culture.

14. According to PDM #1 REPORT, *supra* note 9, DOD's plans for stable multi-year funding is akin to a mortgage: DOD and Congress make a commitment to a stable level of funding so that DOD can integrate restoration with other programs; the regulators can depend upon a stable commitment from DOD; and the public and communities can see that DOD intends to fulfill its obligations.

15. *See* DOD ENVT'L PROGRAMS, *supra* note 13, and GEN. ACCOUNTING OFFICE, ENVIRONMENTAL CLEANUP: DEFENSE FUNDING ALLOCATION PROCESS AND REPORTED FUNDING IMPACTS (hereinafter ENVT'L CLEANUP)(Rep. No. NSIAD 99-34) (Nov. 1998).

16. *See* DOD ENVT'L PROGRAMS, *supra* note 13.

17. The Defense Planning Guidance is the annual source of planning guidance and goals for major DOD programs. The DPG is a coordinated effort between program and financial managers which ensures that established goals reflect fiscal reality and are consistent with overall DOD priorities. Once established, the DPG becomes the cornerstone of, and determines the investment strategy for, the program. It serves as the basis for justifying and defending requirements and budgets during internal program development and budget reviews as well as for articulating effects on the program when Congress fails to appropriate requested funds or makes recissions. *See* PDM #1 REPORT, *supra* note 9.

18. PDM #1 REPORT, *supra* note 9.

19. Under a DSMOA, a state provides oversight and compliance monitoring in return for reimbursement of up to one percent of DOD's clean-up costs for ERA sites and up to one and one-half percent at BRAC sites. DEPARTMENTS OF DEFENSE AND ENERGY, POTENTIAL IMPACTS OF THE PROPOSED AMENDMENT TO THE CERCLA WAIVER OF SOVEREIGN IMMUNITY: REPORT TO CONGRESS (hereinafter POTENTIAL IMPACTS)(Feb. 1999); CONG. RES. SERVICE, REPORT FOR CONGRESS — DEPARTMENT OF DEFENSE ENVIRONMENTAL PROGRAMS: BACKGROUND AND ISSUES FOR CONGRESS (Rep. No. 96-218F) (Mar. 6, 1996); PDM #1 REPORT, *supra* note 9.

20. 10 U.S.C. §§ 2701-07 The original congressional intent was to "fence" environmental restoration funds from other DOD missions because: (1) Restoration requirements should be based on addressing risk to human health and the environment; (2) Congress considered it inappropriate that current operations and activities assume the burden of paying for restoration requirements created by past operations and practice, and (3) Congress wanted to provide appropriate visibility of, and continued commitment to, the restoration program and, simultaneously, ensure the continued protection of mission readiness. *See* PDM #1 REPORT, supra note 9.

21. DOD ENVT'L PROGRAMS, *supra* note 13.

22. *See* Babich, *supra* note 4 at 28, 30, and the U.S. District Court's view on the theory in Colorado v. U.S. Department of the Army, 707 F. Supp. 1562 (D. Colo. 1989), *aff'd* 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 922 (1994).

23. Testimony of F. Henry Habicht II, Assistant U.S. Attorney General, Land and Natural Resources Division, before the Oversight and Investigations Subcommittee of the Energy and Commerce Committee, U.S. House of Representatives (Apr. 28, 1987).

24. In the even more circumscribed criminal enforcement arena, the seminal case is United States v. Dee, the successful 1989 prosecution by the U.S. Attorney for the District of Maryland of three civilian employees of the U.S. Army at the Aberdeen Proving Grounds for violations of the Resource Conservation and Recovery Act. The appellate decision affirming the convictions is reported at 912 F.2d 741 (4th Cir. 1990). DOD ENVT'L PROGRAMS, *supra* note 13.

25. "Congress does not like to appropriate funds for federal facilities to pay civil penalties for violations. They want funds to go to cleanup." Interviews and correspondence between author and a senior EPA official (requesting anonymity)(Feb. 25, 1999) and interview by the author with a senior DOD official (requesting anonymity) (Mar. 5, 1999).

26. *See* KATHERINE N. PROBST AND MICHAEL H. MCGOVERN, RESOURCES FOR THE FUTURE/CENTER FOR RISK MANAGEMENT, LONG-TERM STEWARDSHIP AND THE NUCLEAR WEAPONS COMPLEX: THE CHALLENGE AHEAD (June 1998). In contrast to DOD, DOE's environmental clean-up budget in FY 1998 is slightly less than $6 billion — over one-third of DOE's total appropriations — dwarfing DOD's $1.5+ billion average annual clean-up appropriation since FY 1992.

27. *See* HEDRICK SMITH, THE POWER GAME: HOW WASHINGTON WORKS (1988). This book is an "insider's view" of Washington power centers, including DOD, by a long-time journalist for the *New York Times*. His description of the "Iron Triangle — the symbiotic partnership of military services, defense contractors, and members of Congress from states and districts where military spending is heavy and visible" — underscores the need for such an authority. *Id.* at 173.

28. DEVOLVEMENT REPORT, *supra* note 9.

29. *See* MILITARY BASES, *supra* note 8.

30. *See* BASE REALIGNMENT AND CLOSURE, *supra* note 7.

31. As an example, Congress' silent reaction to the Secretary's Report was deafening, particularly in light of its statutory charge to DOD to report on the need, if any, for additional BRAC rounds. GAO's November 1998 analysis of the Secretary's Report speaks for itself:

> DOD's report to the Congress provided most, but not all, of the information required in section 2824 of the National Defense Authorization Act for Fiscal Year 1998. . . . In selected instances, usually because data were not available, DOD either did not provide the information required or did not provide it in the level of specificity required.
>
> . . . .
>
> [D]OD did not present a description of the types of installations that would be recommended for closure or realignment, by service, in one or more future BRAC rounds as required. Rather DOD indicated that all bases would be considered for closure or realignment in any future BRAC round. . . . DOD officials said that its analysis was not designed to identify bases that would be closed in additional BRAC rounds. According to DOD officials, individual base-level data, such as that collected for a BRAC round would be required to specify the types of installations that would be recommended for closure. They also said that section 2824(f) of the 1998 Act prohibited DOD from expending resources to conduct such data-gathering efforts. DOD's view has some merit; however, it appears that DOD could have taken additional steps to illustrate more clearly how much excess capacity existed within categories of bases.

MILITARY BASES, *supra* note 8, at 2, 11.

32. The Defense environmental program commenced in FY 1984 with an appropriation of $250 million for restoration ("cleanup"). Its "high water mark" was in FY 1994 with an appropriation of $1.96 billion. *See* DOD ENVT'L PROGRAMS, *supra* note 13, and ENVT'L CLEANUP, *supra* note 15.

33. 349 U.S. 294 (1955).

34. U.S. EPA, FEDERAL FACILITY COMPLIANCE STRATEGY (Nov. 1988), cited by Gale Norton, Attorney General, State of Colorado, Before the Senate Subcommittee on Superfund, Waste Control, and Risk Assessment, Environment and Public Works Committee, 103d Cong. 1st Sess. (May 9, 1995). It states, in part:

> States are not subject to the same constraints as EPA regarding enforcement actions against Federal facilities. As a result, states generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at Federal facilities. *States should use the full range of their enforcement authorities to address Federal facility violations* to the same extent they are used for non-federal facilities while meeting the requirements of timely and appropriate enforcement response.

(Emphasis added.)

35. The role of the states advocated here is consistent with the states' leadership role set forth in FROM CRISIS TO COMMITMENT, *supra* note 9. This includes state litigation authority via a waiver of sovereign immunity in state law and partnering with EPA to fix appropriate clean-up standards. Such state-led litigation could be an effective mechanism to cure the deficiencies of the DOD clean-up system (inconsistency oversight, independent enforcement, and adequate funding).

36. Only a few states have used litigation successfully for cleanups at federal facilities, including California, Colorado, Ohio, Texas, and Washington.

37. One persistent budgetary excuse for DOD inaction is the federal Anti-Deficiency Act, 31 U.S.C. § 1341, which generally holds that a federal agency cannot spend funds for activity for which there has not been any appropriation.

38. *See* THOMAS H. EDWARDS, ENVIRONMENTAL JURISDICTION AT CLOSING MILITARY BASES (National Association of Attorneys General Environment Series) (Sept. 1994).

39. *See Lamberth Lambasts the State — Again*, LEGAL TIMES, Mar. 1, 1999, at 12. The case is Cobell v. Babbit, No. 96-1285 (D.D.C. Feb. 22, 1999).

40. *See Funding and Priority Setting*, chapter 5 of the FINAL REPORT OF THE FEDERAL FACILITIES ENVIRONMENTAL RESTORATION DIALOGUE COMMITTEE: CONSENSUS PRINCIPLES AND RECOMMENDATIONS FOR IMPROVING FEDERAL FACILITIES CLEANUP (Apr. 1996) at 75.

41. Hopkins v. United States, Civil Action No. 3:97CV147 (E.D. Va. Oct. 28, 1997). For a recounting of the history of the Avtex Superfund site, *see* FMC Corporation v. Department of Commerce, 29 F.3d 833 (3d Cir. 1994).

42. DEPARTMENT OF THE ARMY FACILITY USE AGREEMENT FOR TRAINING AND SUPPORT OF THE VIRGINIA ARMY NATIONAL GUARD AND OTHER DEPARTMENT OF DEFENSE ACTIVITIES, FORT PICKETT MILITARY RESERVATION, BLACKSTONE, NOTTOWAY COUNTY, VIRGINIA (Agreement No. DACA 65-3-98) (Sept. 30, 1997).

43. Prior to execution, EPA representatives indicated to Virginia's negotiators that the FUA reflected the most extensive legal protection ever agreed to by DOD under such circumstances.

44. For an informative primer on UXO. *see* NAVAL EXPLOSIVE ORDNANCE DISPOSAL TECHNOLOGY DIV/UXO COUNTERMEASURES DEP'T. U.S. NAVY. UNEXPLODED ORDNANCE (UXO) — AN OVERVIEW (June 1996). *See also* Michael Orey. *At Former Military Sites, a Hidden Peril,* WALL ST. J., Jan. 22. 1999 at B1. The article cites DOD estimates of fifteen million acres to be surveyed for UXO.

45. U.S. Sen. Robert Stafford. when introducing the Superfund Amendments and Reauthorization Act of 1986 Conference Report to the Senate. noted. "[N]o loophole. it seems. is too small to be found by the Federal Government." 132 Cong. Rec. S14903 (daily ed. Oct. 3. 1986). *See also* Babich, *supra* note 4. at 28. 30.

46. ENVT'L PROTECTION. *supra* note 13; section 322. H.R. 3616 (FY 1999 Defense Authorization legislation); letter from Earl Anthony Wayne. Acting U.S. Secretary of State to Raymond Chretien. Ambassador from Canada to the United States (Oct. 7. 1996); letter from Raymond Chretien to Earl Anthony Wayne (Oct. 9. 1996). What is noteworthy is that. in the October 7 letter, Wayne states that the United States has no legal obligation under U.S. or international law to reimburse these clean-up costs. The letter adds that. because this is an *ex gratia* offer (accepted in the October 9th letter). it requires specific legislative authority from Congress.

47. The warnings and advocated issues herein mirror those contained in FROM CRISIS TO COMMITMENT, *supra* note 9. This includes the issue of waiver of sovereign immunity, promoting state litigation authority and oversight, and concerns about the adequacy of environmental funding and cleanups.

48. *See* BASE REALIGNMENT AND CLOSURE, *supra* note 7. *See also* MILITARY BASES. *supra* note 8.

49. *See also Cohen May Let Bases Die If Closing OK Isn't Given,* WASH. TIMES. Apr. 3. 1998. at A4.

50. *DOD Requests $3.9 Billion for Environmental Programs in Fiscal Year 2000,* DEF. ENVT'L ALERT, Feb. 9, 1999, at 3.

51. MILITARY BASES. *supra* note 8, *citing* GEN. ACCOUNTING OFFICE, DEFERRED MAINTENANCE REPORTING: CHALLENGES TO IMPLEMENTATION (Rep. No. AIMD-98-42) (Jan. 30, 1998) and GEN ACCOUNTING OFFICE, DEFENSE INFRASTRUCTURE: DEMOLITION OF UNNEEDED BUILDINGS CAN HELP AVOID OPERATING COSTS (Rep. No. NSIAD 97-125) (May 13. 1997).

52. As quoted in *Pentagon Will Defer Over Half of BRAC Cleanup Appropriations in FY00,* DEF. ENVT'L ALERT, Jan. 26, 1999, at 3.

53. *Id.*

54. *Protracted California DSMOA Debate Affecting Cleanups, EPA Official Says,* DEF. ENVT'L ALERT, Feb. 9, 1999, at 11; *California, Navy Fight Over Latest Funding Levels for Cleanup Oversight,* DEF. ENVT'L ALERT, Jan. 26, 1999, at 4.

55. *See* both the district court's and Tenth Circuit's decisions in *Colorado v. Army, supra* note 22.

56. *See EPA Weighs Enforcing DOD FUDS Cleanup as Private Superfund Sites,* DEF. ENVT'L ALERT, Feb. 9, 1999, at 3.

57. An example of this continuing occurrence is the February 1999 discovery of buried German mustard gas bombs at the Memphis Defense Depot in Tennessee. A contractor is now digging them up, some fifty-three years after their burial. Tom Charlier, *WWII Mustard Gas Pit To Be Dug Up; Depot Buried German Bombs,* COMM. APPEAL, Feb. 15, 1999, at A1. As evidence that this UXO threat knows no boundaries, the Corps of Engineers is continuing to clean up the wealthy Spring Valley section of the District of Columbia, residential home to many of the "power elite" in Washington, including at least one foreign embassy.

58. DEP'T OF DEFENSE, POLICY ON RESPONSIBILITY FOR ADDITIONAL ENVIRONMENTAL CLEANUP AFTER TRANSFER OF REAL PROPERTY (July 25, 1997).

59. For a more expansive statement on the "Early Transfer" issue, *see* Vicky L. Peters (Ass't Attorney General, Colorado), *Concerns Remain Regarding Authority to Transfer Contaminated Federal Property,* NAAG MILITARY BASE CLOSURE BULL., Jan/Feb. 1997.

60. 42 U.S.C. § 6961(a). The act was passed in response to states' displeasure with the decision in DOE v. Ohio, 112 S.Ct. 1627 (1992), regarding contamination at DOE's uranium processing plant in Fernald, Ohio.

61. POTENTIAL IMPACTS, *supra* note 19.

62. Letter from Fred Hansen, Deputy Administrator, U.S. EPA, and John J. Hamre, Deputy Secretary, Department of Defense, to John H. Chafee, Chair of the Senate Committee on Environment and Public Works, May 5, 1998.

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